Supreme Court, U. S.
FILED
SEP 17 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-125

GETTY OIL COMPANY,
Appellant,

VERSUS

OKLAHOMA TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF OKLAHOMA

REPLY BRIEF

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Appellant, referred to in its Jurisdictional Statement and hereinafter as "Getty," asks the Court to grant its appeal and overrule the Motion to Dismiss or Affirm filed by Appellee, hereinafter referred to as Tax Commission, for the reason that the Jurisdictional Statement filed by Getty as well as the record below clearly manifest the fact that Getty timely and properly raised and presented a substantial federal question to the Supreme Court of Oklahoma upon which federal question that court rendered a decision adverse to Getty by sustaining the validity of a state taxation statute attacked on the ground of its being repugnant to the Fourteenth Amendment to the United States Constitution.

A. A SUBSTANTIAL FEDERAL QUESTION WAS BOTH TIMELY AND PROPERLY RAISED IN THE SUPREME COURT OF OKLAHOMA.

Getty's Jurisdictional Statement outlines and develops at length the fact that the record of the proceedings below is replete with instances in which the validity of the state statute in question was attacked on the ground of its being repugnant to the Fourteenth Amendment. That the validity of the state taxation statute itself rather than simply the assessment of the additional tax liability was challenged by Getty renders inapposite to the instant facts Tax Commission's reliance on *Wilson* v. *Cook*, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 794 (1946). The record below demonstrates on its face that Getty raised and argued the substantial federal question at every procedural opportunity available to it during the course of those proceedings.

It is not denied by Getty that other issues in addition to that federal question were raised and arguments presented by Getty during the course of those proceedings. It is axiomatic that any court should carefully avoid basing a decision on constitutional grounds when there exist any other reasonable bases upon which its decision may rest. Getty urged the Supreme Court of Oklahoma to decide the case below as a matter of statutory construction. In its Brief to the Supreme Court of Oklahoma, Getty suggested the proper manner of construing the various provisions of the state statute in question so as to arrive at a fair and equitable result treating uniformly all Oklahoma taxpayers similarly situated. Such a statutory construction would have avoided the constitutional issue here involved. However, Getty's arguments were rejected.

Getty further argued before the Supreme Court of Oklahoma that the state statute in question, if applied as Tax Commission sought, discriminated in an invidious manner against taxpayers engaging in multi-state business operations which have incurred net operating losses in Oklahoma business activities but which have realized sufficient income from operations in other states to absorb those Oklahoma losses. Getty was persistent in raising the federal question and in asserting that denial of the deduction under the facts presented was unreasonable, arbitrary and discriminatory, and constituted a denial of equal protection of the laws under the Fourteenth Amendment.

B. THE SUPREME COURT OF OKLAHOMA RECOGNIZED THE SUBSTANTIAL FEDERAL QUESTION RAISED AND DECIDED IT ADVERSELY TO GETTY.

In its Motion to Dismiss or Affirm, Tax Commission concedes the point raised by Getty in its Jurisdictional Statement that an appeal lies from a state court of last resort of a decision sustaining the validity of a state statute drawn in question on the ground of its being repugnant to the Federal Constitution if that question is either presented to that state court or decided by it. Thus, as Tax Commission must necessarily further concede, demonstration that the Supreme Court of Oklahoma did in fact base its decision on its interpretation of the Fourteenth Amendment renders moot Tax Commission's first argument raised in its Motion to Dismiss or Affirm that the federal question herein asserted by Getty was neither timely nor properly raised.

This Court has consistently held that when it appears from the opinion of the state court of last resort that a state statute was drawn in question on the ground of its being repugnant to the Federal Constitution, and the decision of that court sustains the validity of that state statute, this Court has jurisdiction on appeal and need not inquire as to the manner in which such question was raised below. See *Raley* v. *Ohio*, 360 U.S. 423, 436, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959); *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 185, 186, 65 S.Ct. 624, 89 L.Ed. 857 (1945). Stated differently, any alleged deficiency in the manner in which a federal question is presented is effectively cured if the highest state court assumes that such question is properly before it and proceeds to consider and determine that issue. In such an event, this Court has heretofore refused to make inquiry into the precise manner of presentation of the federal question in the court below. *Saltonstall* v. *Saltonstall*, 276 U.S. 260, 267, 268, 48 S.Ct. 225, 72 L.Ed. 565 (1928).

The Supreme Court of Oklahoma decided the federal question raised and asserted by Getty. In its opinion, that court expressly denied that the state statute attacked by Getty "creates unconstitutionally arbitrary discrimination against non-resident taxpayers in the position of Getty. . . ." *Getty Oil Company* v. *Oklahoma Tax Commission*, 563 P.2d 627, 631 (Okla. 1977). In so ruling, the Supreme Court of Oklahoma, as does Tax Commission in its Motion to Dismiss or Affirm, ignored the multi-state/single-state classification challenged by Getty, and purported to distinguish on factual grounds the decision of the Supreme Court of New York (Appellate Division, Third Judicial District) in *Graham* v.

State Tax Commission, 369 N.Y.S.2d 863, *aff'd*, 389 N.Y.S. 362, 357 N.E.2d 1017 (1975), cited by Getty as highly persuasive authority. In distinguishing the *Graham* decision, the Supreme Court of Oklahoma created a "strawman" resident/non-resident distinction upon which to support its reasoning. However, in so doing, the Supreme Court of Oklahoma necessarily recognized and rejected Getty's contention that its claim for relief from inception has been grounded on the Equal Protection Clause of the Fourteenth Amendment. The New York *Graham* decision deals with a factual situation remarkably similar to that at issue, wherein the New York court struck down the validity of a state taxation statute closely resembling the Oklahoma taxation statute in question and granted relief under the Fourteenth Amendment to an aggrieved taxpayer for the reason that the state taxation statute was "unreasonable, arbitrary or capricious and, therefore, invalid," citing the earlier decision of that court in *Grossman* v. *Baumgartner*, 17 N.Y.2d 345, 271 N.Y.S.2d 195 (N.Y. App. 1966). The *Grossman* decision carefully analyzes and expressly rests on a long line of United States Supreme Court decisions construing the Equal Protection Clause of the Fourteenth Amendment. Thus, the fact that the Supreme Court of Oklahoma expressly passed on the federal question raised by Getty cannot be controverted.

C. THE FEDERAL QUESTION IS SUBSTANTIAL.

Tax Commission argues that the state taxation statute in question does not discriminate against Getty and other Oklahoma taxpayers similarly situated on the basis of citizenship or residence. That such an argument is asserted by Tax Commission at this late stage in the proceedings is manifest evidence of Tax Commission's resolute refusal to confront the very issue central to Getty's appeal. Getty further notes that the Supreme Court of Oklahoma based its decision on an express finding that the challenged statute treats residents and non-residents in a like manner. Getty has never argued that the discriminatory effect of that statute rests on the basis of a citizenship or residency classification. The "Question Presented" in Getty's Jurisdictional Statement accurately reflects the federal question raised.

Neither Tax Commission nor the Supreme Court of Oklahoma has denied that a distinction has been drawn in the class of taxpayers doing business within Oklahoma which have incurred net operating losses between those taxpayers which do business exclusively in Oklahoma and those taxpayers which also do business outside the State. No explanation for the resulting disparity in treatment for taxation purposes has been adduced during the course of these proceedings to date. Both Tax Commission and the Supreme Court of Oklahoma have failed and refused to respond to the contention of Getty that the multi-state/single-state classification drawn by the construction of the taxation statute in question is arbitrary and discriminatory in violation of the Fourteenth Amendment.

Apparently in an attempt to respond to Getty's argument raised in its Jurisdictional Statement that Tax Commission has failed to justify the discriminatory distinction drawn between taxpayers engaged in multi-state business operations and those engaged in business operations in Oklahoma only, Tax Commission now suggests for the first time that the challenged Oklahoma taxation statute permits the Oklahoma Tax Commission to dispense with the need for auditing state income tax returns filed by Oklahoma taxpayers. Tax Commission speculates that some perceived notion of "administrative convenience" was the avowed purpose underlying enactment by the Oklahoma Legislature of that statute. As discussed at length by Getty in its Petition for Rehearing (Appendix "F", Jurisdictional Statement) filed with the Supreme Court of Oklahoma, it is highly significant that the only other courts which have considered the "administrative convenience" justification raised in defense of the validity of another very similar state taxation statute have flatly rejected that argument as being an unreasonable basis for a discriminatory classification between two taxpayers similarly situated. See *In re Avien, Inc.*, 390 F.Supp. 1335 (E.D. New York 1975), *aff'd*, 532 F.2d 273 (2d Cir. 1976).

In defense of the sustention of validity of the Oklahoma taxation statute by the Supreme Court of Oklahoma, Tax Commission would argue that in order to achieve such "administrative convenience," numerical conformity between a taxpayer's federal and Oklahoma income tax returns is required by the statute in question. However, when Section 2358(A)(3)(d) of the Oklahoma Income Tax Act is relegated to serving only the purpose of administrative

convenience and numerical conformity, the arbitrary and unreasonable nature of the distinction drawn between multi-state taxpayers and taxpayers engaged in business operations only in Oklahoma becomes blatant. First, strict numerical conformity between state and federal income tax returns filed by the two classes of taxpayers is simply impossible because the multi-state business taxpayer's federal income tax return will reflect Oklahoma as well as outside-Oklahoma income while both returns filed by the taxpayer engaged in business operations only in Oklahoma will of course reflect only Oklahoma income. Moreover, as suggested by the United States Court of Appeals for the Second Circuit in its decision in *In re Avien, Inc.*, 532 F.2d 273 (2d Cir. 1976), a test involving "procedural conformity" in arriving at permissible computation procedures used to calculate deductions is reasonable as opposed to a strict "numerical-figure conformity" test such as that applied by the Supreme Court of Oklahoma in the case below.

To require strict conformity of numbers between a taxpayer's federal and Oklahoma income tax returns, rather than conformity of procedures used to calculate those numbers, not only produces an unreasonable and impossible result in the instant case, but also is squarely inconsistent with the mandate of the Oklahoma Income Tax Act which compels a taxpayer to employ the separate allocation accounting method of reporting income and losses by allocating all income and losses produced to the individual states in which the multi-state taxpayer has operated during the taxable year. 68 O.S. 1971, § 2358(A)(3). As this Court stated in *Stanley* v. *Illinois*, 405 U.S. 645, 656, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), ". . . the Constitution recognizes

higher values than speed and efficiency." The "administrative convenience" argument presented by Tax Commission is so attenuated as to be unworthy of recognition by this Court.

Tax Commission makes no attempt to distinguish the cases cited by Getty substantiating the contention that the federal question involved is substantial other than to observe, as Getty said in its Jurisdictional Statement, that those cases deal with statutory tax exemptions, and not deductions. Such a purported distinction is entirely unresponsive and devoid of merit. It is noteworthy that Tax Commission does not deny that, while the nature of the tax benefits withheld from the various litigant-taxpayers in the cases cited are somewhat different from that denied Getty, the adverse and arbitrary result to Getty and other taxpayers similarly situated is no less burdensome or inequitable, nor is the underlying rationale any more defensible. Again in this vein, the reluctance, unwillingness or inability of Tax Commission to discuss or suggest reasons supporting the challenged multi-state/single-state classification confirms the weakness of its Motion to Dismiss or Affirm.

Tax Commission asserts that it was the intent of the Oklahoma Legislature to deny the tax deduction in question to taxpayers in the position of Getty. If this Court concludes that the statute challenged by Getty is in fact arbitrary, discriminatory and in violation of the Fourteenth Amendment, and, hence, void, then even if the Oklahoma Legislature intended that result, this certainly cannot be considered redemptive.

Tax Commission also suggests that the Oklahoma Legislature "could" have based the challenged multi-state/

single-state classification on the "ability of a class [of taxpayers] to pay." Tax Commission argues that simply because Getty was able to absorb its net operating losses in Oklahoma from its operations conducted outside Oklahoma and reflect net operating income for federal income tax purposes that the deduction in question should be withheld from Getty, but allowed to an Oklahoma taxpayer reflecting net operating losses on both its federal and Oklahoma income tax returns. Because it was that income generated from its operations conducted outside Oklahoma which absorbed the Oklahoma net operating losses so as to preclude Getty from claiming a net operating loss carry-over deduction on its federal income tax return, it is blatantly contradictory for Tax Commission to simultaneously maintain that denial of that deduction to Getty is not "an indirect tax on income from sources outside of Oklahoma." Furthermore, Tax Commission disregards the fact that an Oklahoma taxpayer's ability to pay income tax is taken into account in determining, first, whether that taxpayer did in fact realize income from its operations in Oklahoma, and, second, in determining how much income was realized therefrom. Obviously, the more income an Oklahoma taxpayer realizes from its operations in Oklahoma, the more dollars in taxes it will pay to the State of Oklahoma. In this manner, every Oklahoma taxpayer bears its equitable share of the tax burden. Such a taxation scheme is eminently more reasonable than penalizing a taxpayer engaged in multi-state operations by denying the claimed deduction for the sole and invidious reason that its operations outside Oklahoma proved to be more profitable than its operations within the State.

To permit a single-state taxpayer to offset its operating losses against its operating income while requiring a multi-state taxpayer to report only its income within the taxing state, in that instance in which income from its operations outside Oklahoma absorbed a loss which might otherwise have been claimed as a net operating loss carry-over deduction on its federal income tax return, denies the multi-state taxpayer equal protection of the laws in violation of the Fourteenth Amendment. The discriminatory classification resulting from that difference in treatment does not "rest upon some ground or difference having a fair and substantial relation to the object of the legislation." *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920).

CONCLUSION

For the foregoing reasons Tax Commission's Motion to Dismiss or Affirm should be refused, and Getty's appeal from the opinion and judgment below should be granted.

Respectfully submitted,

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